The African Court on Human and Peoples' Rights

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The African Court on Human and Peoples' Rights: A Uniquely Equipped Testbed for (the Limits of) Human Rights Integration?

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1. Introduction

International human rights law is embedded within an international law that is fragmented by design. At the same time, human rights law itself forms a fragmented universe, on account of both its multilevel architecture and governance ― comprising universal, regional and subregional levels of protection ― and the (over)specialisation of the field. Against this background, human rights integration is seen as a means to mitigate certain of the challenges associated with this fragmentation. Human rights integration may also be an opportunity to restore focus on the user(s) of the human rights system, and one the arguments that can be employed with the aim of framing an individual's claims and calling for the highest possible level of protection across different regimes and specialties.[1]

Within the confines of positive law, human rights integration can be pursued on three different levels/stages: first, when States draft a human rights treaty; second, when an international court or other international body interprets that treaty and, third, when the treaty is applied.[2] Human rights integration is, accordingly, constrained by the limitations attached to these three different tasks. In this regard, this chapter argues that the African Court on Human and Peoples' Rights (ACtHPR) is uniquely situated to pursue human rights integration. This is due to three distinctive features pertaining to the African Charter on Human and Peoples' Rights (ACHPR)[3] and the ACtHPR's mandate. First, the indivisibility, interdependence and interrelation of human rights are not merely underlying principles and postulates but are specifically entrenched in the text of the ACHPR; the ACHPR provides civil and political rights alongside economic, social and cultural rights and peoples' rights. Second, the ACtHPR enjoys the jurisdiction to interpret and apply not only the ACHPR but also any other relevant human rights instrument ratified by the States concerned. Hence, the ACtHPR enjoys a considerably

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[1] E BREMS, 'Should Pluriform Human Rights Become One? Exploring the Benefits of Human Rights Integration' [2014] *European Journal of Human Rights* 447.

[2] Interestingly, domestic courts have a different and more expansive (vis-à-vis international courts) role in pursuing human rights integration. See A RACHOVITSA, 'Treaty Clauses and Fragmentation of International Law: Applying the More Favourable Protection Clause in Human Rights Treaties' (2016) 16 *Human Rights Law Review* 77, 81-83.

[3] (Adopted 27 June 1981, entered into force 21 October 1986) Organisation of African Unity, CAB/LEG/67/3 rev. 5, 21 ILM 58 (1982).

broader mandate *ratione materiae* vis-à-vis other international human rights courts. Third, the ACtHPR is specifically directed by Articles 60 and 61 ACHPR to draw inspiration from other international instruments when interpreting the rights envisaged in the ACHPR.

The chapter discusses two out of these three distinctive features in connection with human rights integration. The analysis on the ACtHPR's jurisdiction merits separate discussion and it will not be treated in this chapter. Consequently, this chapter focuses on human rights integration in the drafting of the ACHPR (Part 2) and human rights integration when the ACtHPR interprets the ACHPR (Part 3). Although the ACHPR and the practice of the African Commission on Human and Peoples' Rights (African Commission or Commission) have attracted the attention of international scholars, it is surprising that not much has been written since the ACtHPR started to develop its case law.[4] The analysis herein provides the first assessment of how the ACtHPR has addressed these issues in its existing jurisprudence (the ACtHPR has, as of 30 October 2017, decided sixteen cases on their merits).[5]

2. Human Rights Integration in the Drafting of the ACHPR and the Potential of the African Human Rights Corpus Juris

The ACHPR is a rather unique treaty, according equal weight to all three generations of human rights: it provides civil and political rights; economic, social and cultural rights; and also peoples' rights. Economic, social and cultural rights include the right to work under equitable and satisfactory conditions (Article 15), the right to health (Article 16), the right to education (Article 17) and the right to a healthy environment (Articles 23 and 24). Peoples' rights encompass the right to self-determination (Articles 20 and 22) and the right to dispose of natural resources (Article 21). Another characteristic of the ACHPR is its emphasis on the duties of the individual towards the community and the State (Article 29). At the same time, the ACHPR omits certain rights (e.g. there is no right to privacy under the ACHPR) and it envisages fewer safeguards compared with other human rights treaties, as can be seen from the poor drafting of the provisions concerning criminal procedure before and during trial (Articles

[4] For two recent studies see See JD MUJUZI, 'The African Court on Human and Peoples' Rights and Its Protection of the Right to a Fair Trial' (2017) 16 *The Law & Practice of International Court and Tribunals* 187, 198 and F VILJOEN, 'Understanding and Overcoming Challenges in Accessing the African Court on Human and Peoples' Rights' (2018) 67 *International & Comparative Law Quarterly* 63.

[5] More specifically, the ACtHPR has finalised, in the exercise of its contentious jurisdiction, forty-one cases: eighteen were declared inadmissible, three were struck off the docket, sixteen were decided on their merits (two of which were decided jointly) and three were judgments on the interpretation of the ACtHPR's rulings. Information available at http://www.african-court.org/en/index.php/cases/2016-10-17-16-18-21#finalised-cases (accessed 23.10.2017).

6 and 7), the limited scope of the right to vote (Article 13), the introduction of claw-back clauses and the vague language of the limitation clauses.[6]

The role of the ACtHPR (and the African Commission) is critical for developing the special features of the ACHPR and the rights provided therein. This role is marked not only by the novelty of economic, social and cultural rights and peoples' rights being justiciable and adjudicated by and before an international human rights court, but also the potential for construing the interrelatedness and indivisibility of human rights in more effective ― and perhaps new ― ways. To this end, human rights integration can be relevant both as an interpretative argument and/or principle (or rather, perhaps, as a set of interpretative arguments and/or principles) and as an outcome of that interpretation process, in two distinct ways. First, human rights integration can be relevant in making international law and human rights responsive to African circumstances and in advancing the African human rights corpus juris.[7] The Commission has begun to develop the contours of a regional human rights culture and the ACtHPR should build on this.[8] Second, and conversely, one needs to bear in mind the possible subsequent contribution of the African corpus juris to the progressive development of international law.[9]

On certain occasions, the African Commission's interpretations have been characterised as either 'very progressive' or 'dangerously loose' constructions of the Charter.[10] For example, the Commission read the right to housing and the right to food into the ACHPR, even though these are not provided therein. The Commission's reasoning was grounded on the fact that the right to housing and the right to food are inseparably linked to the dignity of human beings and are essential for the enjoyment and fulfilment of other rights, such as the rights to property, health and family life.[11] Turning to another issue, in the *Social and Economic Rights*

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[6] C HEYNS, 'The African Regional Human Rights System: In Need of Reform?' (2001) 2 *African Human Rights Law Journal* 155, 161; E BREMS, *Human Rights: Universality and Diversity*, Martinus Nijhoff Publishers, The Hague 2001, pp 116-117, 126-128, 133-136.

[7] African Commission on Human Rights, *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria*, App. No. 155/96, 27 October 2001 § 68.

[8] R MURRAY, 'A Comparison between the African and European Courts of Human Rights', (2002) 2 *African Human Rights Law Journal* 195, 219; I BANTEKAS and L OETTE, *International Human Rights Law and Practice*, Cambridge University Press, Cambridge 2016 2nd ed, p 281; M MUTUA, 'The African Human Rights Court: A Two-Legged Stool?' (1999) 21 *Human Rights Quarterly* 342, 362.

[9] See also AK PERRIN, 'African Jurisprudence for Africa's Problems: Human Rights Norm Diffusion and Norm Generation Through Africa's Regional International Court' (2015) *American Society International Law Proceedings* 32. On the contribution of the International Court of Justice and the European Court of Human Rights to the development of international law see respectively H LAUTERPACHT, *The Development of International Law by the International Court*, Steven & Sons Limited, London 1958, pp 37-40 and JG MERRILLS, *The Development of International Law by the European Court of Human Rights*, Manchester University Press, 1993, 2nd ed.

[10] I BANTEKAS and L OETTE, above note 8, pp 279-280.

[11] *SERAC and CESR v Nigeria* §§ 60, 65

Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria case, the Commission made certain important pronouncements concerning peoples' rights by articulating the collective nature of such rights in light of the ACHPR's provisions. The case concerned the protection of the Ogoni people from the adverse effects of oil exploration in the Niger Delta. Forced evictions were found to constitute a violation of the right to housing enjoyed by the Ogoni as a *collective right*.[12] Moreover, the Commission accepted the applicants' allegation linking Article 4 on the right to life and integrity of the person to the life of the *Ogoni society as a whole*. The Commission went on to find that Nigeria had violated Article 4 with respect not only to specific individuals in Ogoniland but also to the Ogoni community as a whole.[13] This was an innovative approach for 2001 and even vis-à-vis the progressive case law of the Inter-American Court of Human Rights (IACtHR) on indigenous peoples' rights established in 2007 in the *Saramaka* judgment.[14]

The ACtHPR, for its part, has not yet had many opportunities to develop the distinctive rights provided in the ACHPR.[15] The ACtHPR has decided, as of 30 October 2017, sixteen complaints on their merits, involving the following States: Côte d'Ivoire (one case), Kenya (one case), Libya (one case), Senegal (one case), Malawi (one case), Rwanda (one case) Burkina Faso (two cases) and Tanzania (eight cases). The subject matter of the complaints mostly concerned well-established civil and political rights, including the right to political participation and the question of whether the prohibition of independent candidature violates an aspirant's right to participate in public affairs;[16] the right to equal protection under the law in the context of assessing the impartiality and independence of electoral bodies;[17] the right to freedom of expression in connection with the right to effective remedy[18] and the question of whether criminal defamation statutes are a proportionate and necessary restriction on freedom of expression;[19] the right to life;[20] the right to be free from arbitrary deprivation of liberty;[21]

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[12] Ibid § 63.
[13] Ibid § 67.
[14] *Saramaka People v Suriname*, Judgment on Preliminary Objections, Merits, Reparations and Costs, Series C, No. 17, 28 November 2007 § 171.
[15] There is one case concerning indigenous peoples' rights (*African Commission on Human and Peoples' Rights v Republic of Kenya*, App. No 006/2012, Judgment on Merits, 26 May 2017) and it will be discussed in Part 3.3.
[16] *Tanganyika Law Society and Legal and Human Rights Centre and Reverend Christopher R. Mtikila v United Republic of Tanzania*, App. Nos. 009 & 011/2011, Judgment on Merits, 14 June 2013.
[17] *Actions pour la Protection des Droits de l'Homme (APDH) v Republic of Cote d'Ivoire*, App. No. 001/2014, Judgment on Merits, 18 November 2016.
[18] *Abdoulaye Nikiema, Ernest Zongo, Blaise Ilboudo & Burkinabe Human and Peoples' Rights Movement v Burkina Faso*, App. No. 013/2011, Judgment on Merits, 28 March 2014.
[19] *Lohé Issa Konaté v Burkina Faso*, App. No. 004/2013, Judgment on Merits, 5 December 2014.
[20] *The African Commission on Human and Peoples' Rights v Libya*, Appl. No. 002/2013, Judgment on Merits, 3 June 2016.
[21] Ibid.

the right to be free from torture;[22] and several aspects of the right to a fair trial (e.g. the right to be heard and to defend oneself, the right to be tried within a reasonable time, to free legal assistance and to the pronouncement of a judgment in open court).[23] These are the first years of the ACtHPR's functioning and in due time the alleged violations and the countries concerned will become more varied.[24]

3 The Interpretative Use of Relevant International Instruments as a Means to Pursue Human Rights Integration

The interpretative use of relevant international instruments not only tells us about the ACtHPR's openness to other standards in general, but can also be a means to pursue human rights integration. The use of other international instruments implicates the ACtHPR in the construction of an international and regional corpus juris on human rights. Moreover, the use of other international instruments and the views of other bodies in the process of interpretation mitigates the risk of conflicting or diverging interpretations of similar or identical treaty provisions. This is particularly important in light of the ACtHPR's distinctively broad contentious jurisdiction. Pursuant to Article 3(1)Protocol 'The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol *and any other relevant Human Rights instrument ratified by the States concerned*'(emphases added).[25] The risk of divergent interpretations of other human rights treaties when the ACtHPR engages with, interprets and applies these treaties is an issue which has not been addressed by neither the ACHPR nor the Protocol.[26] At the same time, however,

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[22] *Alex Thomas v United Republic of Tanzania*, App. No. 005/2013, Judgment on Merits, 20 November 2015; *The African Commission on Human and Peoples' Rights v Libya*.

[23] *Alex Thomas*; *Wilfred Onyango Nganyi & 9 Others v United Republic of Tanzania*, App. No. 006/2013, Judgment on Merits, 18 March 2016; *Mohamed Abubakari v United Republic of Tanzania*, App. No. 007/2013, Judgment on Merits, 3 June 2016; *Christopher Jonas v United Republic of Tanzania*, Appl. No. 011/2015, Judgment on Merits, 28 September 2017.

[24] This was also the case with the Commission, which now addresses more diverse questions concerning armed conflict, oil extraction, collective rights, indigenous peoples and mass expulsions. I BANTEKAS and L OETTE, above note 8, pp 277-279.

[25] Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights (adopted 10 June 1998; entered into force 25 January 2004) (Protocol). The Protocol was replaced by the Protocol on the Statute of the African Court of Justice and Human Rights on 1 July 2008 merging the African Court on Human and Peoples' Rights and the Court of Justice of the African Union into one single court. See, in general, F VILJOEN, *International Human Rights Law in Africa*, Oxford University Press, New York 2012 2nd ed, pp 435-439.

[26] Separate Opinion of Vice-President Fatsah Ouguergouz in *Tanganyika Law Society* § 16; F VILJOEN, above note 25, p 438; GJ NALDI and K MAGLIVERAS, 'Reinforcing the African System of Human Rights: The Protocol on the Establishment of a Regional Court of Human and Peoples' Rights' (1998) 16 *Netherlands Quarterly of Human Rights* 431, 436.

one should not overemphasise the fragmentation of international jurisprudence or the divergence of views of the international bodies entrusted with monitoring human rights treaties. These matters can be mitigated, as it will be discussed herein, to a great extent, in the course of interpretation and by being aware of, and taking into account, the views of other international bodies and courts. The discussion below addresses the following issues: how the ACtHPR engages with international instruments in its reasoning; the quality of its judicial reasoning in terms of legal methodology; the different uses of these instruments and their impact on the interpretation of the ACHPR (3.2); and, finally, the development of the specificity of the ACHPR and the African human rights corpus juris in the pursuit of international human rights integration (3.3).

Article 60 and Article 61 of the ACHPR concern the use of other international law instruments in interpreting the ACHPR. Article 60 provides that:

> The Commission shall draw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on Human and Peoples' Rights, the Charter of the United Nations, the Charter of the Organisation of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of Human and Peoples' Rights, as well as from the provisions of various instruments adopted within the Specialised Agencies of the United Nations of which the Parties to the present Charter are members.

Article 61 refers only to the consideration of other rules as *subsidiary* measures to determine principles of law, and its scope is restricted to treaties, practices, customs, general principles, legal precedents and doctrine *originating from or accepted by African States*.[27] Article 60 is therefore of a more general scope and has a more global outlook in terms of the instruments that may be taken into account in the process of interpretation. Articles 60 and 61 are interesting examples of the pursuit of human rights integration at the international and regional levels respectively.[28] Other human rights treaties, including the International Covenant on Civil and

[27] Article 61 reads: 'The Commission shall also take into consideration, as subsidiary measures to determine the principles of law, other general or special international conventions, laying down rules expressly recognised by Member States of the Organisation of African Unity, African practices consistent with international norms on Human and Peoples' Rights, customs generally accepted as law, general principles of law recognised by African States as well as legal precedents and doctrine.'

[28] E BREMS, above note 6, p 94.

Political Rights (ICCPR),[29] the International Covenant on Economic, Social and Cultural Rights (ICESCR),[30] the European Convention on Human Rights (ECHR),[31] and the Inter-American Convention on Human Rights (IACHR),[32] do not contain equivalent clauses. This suggests that the drafters of the ACHPR specifically chose to include these guidelines supporting human rights integration.

3.1 The Consideration of Relevant International Instruments and Views and Judgments of Other International Bodies or Courts

The interpretative directions envisaged in Articles 60 and 61 are addressed to both the African Commission and the ACtHPR.[33] Article 60 paves the way for the ACtHPR to draw inspiration from and use instruments that are not binding. The provision makes specific mention of international law on human and peoples' rights and goes on to provide a non-exhaustive list ('particularly from') including non-binding instruments such as the Universal Declaration on Human Rights (UDHR) or instruments adopted by UN specialised agencies. Therefore, the ACtHPR is able to use non-binding instruments or even treaties that are not ratified by the State concerned as interpretative aids.[34] This conclusion is further supported by the fact that when the drafters of the ACHPR and the Protocol did intend to introduce the requirement for a treaty to have been ratified by the State(s) concerned, they did so explicitly.[35] Interestingly, Article 60 ACHPR has looser requirements compared with Article 31(3)(c) Vienna Convention on the Law of Treaties (VCLT) concerning the consideration of relevant rules of international law applicable in the relations between the parties.[36] The interpretative principle embodied in Article 31(3)(c) VCLT specifically requires (a) *rules,* strongly suggesting that it excludes non-binding instruments and (b) that these rules be *applicable in*

[29] (Adopted on 16 December 1966; entered into force on 23 March 1976) 999 UNTS 171.
[30] (Adopted on 16 December 1966; entered into force on 3 January 1976) 993 UNTS 3.
[31] (Concluded 4 November 1950; entered into force 3 September 1953) ETS 5.
[32] (Concluded 21 November 1969; entered into force 18 July 1978) OAS Treaty Series No 36.
[33] *Tanganyika Law Society* § 107.4; *African Commission on Human and Peoples' Rights v Republic of Kenya* § 108. Individual judges in their opinions also refer to Articles 60 and 61. See Partly Dissenting Opinion of Vice-President, Justice Elsie N. Thompson in *Mohamed Abubakari* § 4. Cf C HEYNS, above note 6, p 169 who argues that Articles 60 and 61 are not addressed to the ACtHPR.
[34] E BREMS, above note 6, p 95.
[35] See Article 3(1) Protocol referring to an 'instrument ratified by the States concerned' and Article 61 Charter referring to 'general or special international conventions, laying down rules expressly recognised by Member States of the Organisation of African Unity'.
[36] Art. 31(3)(c) VCLT reads: 'There shall be taken into account, together with the context . . . any relevant rules of international law applicable in the relations between the parties.' See J PAUWELYN, *Conflict of Norms in Public International Law*, Cambridge University Press, New York 2003, p 256; B RUDOLF, 'Unity and Diversity in the Settlement of International Disputes' in A ZIMMERMANN and R HOFMANN (eds), *Unity and Diversity in International Law*, Duncker and Humbolt, Berlin 2006, p 389, pp 391-392.

the relations between the parties, which means that at least the State concerned (if not all contracting parties to the treaty under interpretation) should have ratified the other treaty.[37] Consequently, Article 60 is a *lex specialis* interpretative rule, and it allows the ACtHPR to take a greater range of norms of international law into account than Article 31(3)(c) VCLT does.

The ACtHPR rarely invokes Articles 60 and 61 ACHPR in an explicit fashion.[38] Still, the ACtHPR regularly draws inspiration from a variety of treaties and non-binding instruments following the similar, long-standing practice of the African Commission.[39] These include general human rights treaties, both global (e.g. the ICCPR[40] or the ICESCR[41]) and regional (e.g. the ECHR[42] or the IACHR[43]); specialised treaties of a regional scope, such as the Cultural Charter for Africa;[44] and non-binding instruments ranging from the UDHR[45] and the UNGA Declaration on the Rights of Indigenous Peoples[46] to the work of the UN Special Rapporteur on Minorities[47] or the 1988 UN Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment.[48]

In addition to international treaties, the ACtHPR gives extensive discussion to the views of UN bodies and the jurisprudence of other international human rights courts. In this way, it holds the appropriate and up-to-date interpretation of a treaty to be that developed by the body entrusted with monitoring it.[49] For instance, the ACtHPR takes into consideration General Comments by the UN Human Rights Committee (HRC) and the ICESCR Committee as

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[37] For a useful overview of the question of the meaning of 'applicable in the relations between the parties' see R GARDINER, *Treaty Interpretation*, Oxford University Press, Oxford 2010, pp 269-275; J PAUWELYN, above note 36, pp 257-263. *Cf.* U LINDERFALK, 'Who Are "the Parties"? Article 31, Paragraph 3(c) of the 1969 Vienna Convention and the "Principle of Systemic Integration" Revisited' (2008) LV *Netherlands International Law Review* 343.

[38] The ACtHPR explicitly used the provisions in *Tanganyika Law Society* § 107.4; *African Commission on Human and Peoples' Rights v Republic of Kenya* § 108.

[39] I BANTEKAS and L OETTE, above note 8, p 279.

[40] *Tanganyika Law Society* § 76; *Lohé Issa Konaté* § 9; *Alex Thomas*; *Mohamed Abubakari*; *Actions pour la Protection des Droits de l'Homme*; *Abdoulaye Nikiema and others*.

[41] *Frank David Omary* § 76; *African Commission on Human and Peoples' Rights v Republic of Kenya* § 2.

[42] *Tanganyika Law Society* §§ 82.1, 106.2-106.5; *Lohé Issa Konaté* §§ 147-154, 158-163; *Alex Thomas* §§ 95-98, 104, 116, 118-119, 146; *Wilfred Onyango Nganyi* §§ 136-154, 172-178; *The African Commission on Human and Peoples' Rights v Libya* § 95; *Mohamed Abubakari* §§ 27, 158, 224; *Actions pour la Protection des Droits de l'Homme* §§ 64, 134, 148.

[43] *Tanganyika Law Society* §§ 82.1, 106.2-106.5; *Lohé Issa Konaté* §§ 147-154, 158-163; *Alex Thomas* §§ 95-98, 104; *Wilfred Onyango Nganyi* § 179; *Actions pour la Protection des Droits de l'Homme* § 95.

[44] *African Commission on Human and Peoples' Rights v Republic of Kenya* § 178.

[45] *Frank David Omary* §§ 74, 76; *Alex Thomas* § 45.

[46] *African Commission on Human and Peoples' Rights v Republic of Kenya* §§ 126-131.

[47] Ibid §§ 105-106.

[48] *The African Commission on Human and Peoples' Rights v Libya* § 92.

[49] This is not always the case, however, since in certain instances the ACtHPR did not (explicitly) refer to the HRC's views regarding the interpretation of the ICCPR. In particular, the ACtHPR did not discuss the HRC, General Comment 32, *'Article 14, Right to equality before courts and tribunals and to fair trial'*, UN Doc CCPR/C/GC/32 23 August 2007 regarding the understanding of Article 14(3)(d) ICCPR in *Alex Thomas* §§ 90-91. See JD MUJUZI, above note 4, p 198.

authoritative statements on the interpretation of the provisions of the respective UN treaties.[50] This is a commendable practice since it mitigates, to a significant extent, the risk of diverging interpretations of the same or similar treaty provisions, both when the ACtHPR exercises its jurisdiction to interpret and apply another human rights treaty[51] and when the ACtHPR takes another treaty into account as an aid to its interpretation of the ACHPR.

More generally, cross-referencing and judicial borrowing[52] offer the ACtHPR the opportunity to benefit from the substantial experience of other international courts on procedural issues. When addressing the question of exhaustion of domestic remedies, the ACtHPR gives due regard not only to the existing practice of the African Commission[53] but also to the jurisprudence of the IACtHR and the European Court of Human Rights (ECtHR).[54] The ACtHPR has consulted and referenced the 2013 *El Salvador/Honduras v Nicaragua* judgment by the ICJ in order to clarify the admissibility requirements for an application for a review of a judgment.[55] The jurisprudence of the ECtHR has been a valuable guide for the Court in deciding whether it enjoys jurisdiction to scrutinise a national authority's assessment of the admissibility of evidence.[56] The practice of judicial borrowing serves the ACtHPR in two ways: first, it fosters dialogue and the coordination and convergence of international jurisprudence, and, second, it legitimises the ACtHPR in the eyes of its constituencies and audience during the first crucial years of its functioning.[57] Notably, it is not only the ACtHPR that relies, for example, on the persuasive force of the case law of the ECtHR and the IACtHR, but also the respondent States.[58] Therefore, the consideration and use of other international

[50] *Tanganyika Law Society* § 107.4; *African Commission on Human and Peoples' Rights v Republic of Kenya* § 181.
[51] The ACtHPR regularly finds violations of other human rights treaties and orders the respondent States to comply with their respective obligations. For example, the ACtHPR found a violation of the ICCPR in *Alex Thomas* § 124; a violation of the African Charter on Democracy, Elections and Governance (adopted on 30 January 2007; entered into force on 15 February 2012); the Economic Community of West African States (ECOWAS) Revised Treaty (adopted 24 July 1993; entered into force 23 August 1995; 2373 UNTS 233) in *Lohé Issa Konaté* §§ 164, 167, 170; and the ECOWAS Protocol on Democracy and Good Governance supplementary to the Protocol relating to the Mechanism for Conflict Prevention, Management and Resolution (Protocol A/SP1/12/01; adopted December 2001) in *Actions pour la Protection des Droits de l'Homme* case §§ 135, 151.
[52] B PIRKER, 'Interpreting Multi-Sourced Equivalent Norms: Judicial Borrowing in International Courts' in T BROUDE and Y SHANY (eds), *Multi-Sourced Equivalent Norms in International Law*, Hart Publishing, Oxford 2011, p 93.
[53] *Tanganyika Law Society* § 82.1; *Actions pour la Protection des Droits de l'Homme* §§ 93-94.
[54] *Tanganyika Law Society* § 82.1; *Actions pour la Protection des Droits de l'Homme* § 95.
[55] *Frank David Omary* § 52.
[56] *Mohamed Abubakari* §§ 25-27.
[57] R MURRAY, above note 8, p 219; Y SHANY, *Questions of Jurisdiction and Admissibility before International Courts*, Cambridge University Press, Cambridge 2016, p 7. See also EF MAC-GREGOR, 'What Do We Mean When We Talk About Judicial Dialogue? Reflections of a Judge of the Inter-American Court of Human Rights' (2017) 30 *Harvard Human Rights Journal* 89, 100.
[58] Tanzania's arguments in *Tanganyika Law Society* § 103 drew on judgments by the IACtHR; Burkina Faso discussed the jurisprudence of the ECtHR in *Lohé Issa Konaté* § 127.

instruments, through cross-referencing and judicial borrowing, are a particularly useful 'currency' before the ACtHPR.

3.2 The Different Uses of Other International Instruments and the Interpretative Impact on the Construction of the ACHPR

The interpretative principle contained in Article 60, allowing the ACtHPR to 'draw inspiration' from other human rights instruments, does not give a concrete indication of how the ACtHPR may use a given instrument or what the interpretative impact on its construction of the ACHPR may be. These are important considerations for assessing the ACtHPR's reasoning and, more generally, for understanding human rights integration. Three main ways in which the ACtHPR uses external sources to interpret the ACHPR are discussed below.

First, the ACtHPR has a regular practice of comparing the text of the ACHPR to other human rights treaties. It is common practice for all international courts and bodies to have recourse to other treaties in order to ascertain the ordinary meaning of certain terms contained in the treaty under interpretation.[59] International judges are inclined to employ such a 'comparative reading', especially during the initial stage of the interpretation process, without necessarily invoking a specific legal basis.[60] Likewise, the ACtHPR does not elaborate on the legal basis for this interpretative practice ― either Article 60 ACHPR or Article 31(1) VCLT with regard to interpreting a treaty in good faith and identifying the common use of a term by States in international law would suffice.[61] The ACtHPR prefers to justify its practice by stating that the provisions of both the ECHR and the IACHR are similar to those of the ACHPR,[62] or that the protection provided for a particular right is more detailed under the ICCPR.[63]

Second, it is interesting how the similarity or dissimilarity of the ACHPR compared to another treaty is invoked to support an expansive or a restrictive interpretation respectively of

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[59] As far as the ICJ is concerned, see *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment, Merits, 26 February 2007, ICJ Rep. 2007, p. 43 § 162; B PETERS, 'Aspects of Human Rights Interpretation by the UN Treaty Bodies' in H KELLER and G ULFSTEIN (eds), *United Nations Human Rights Treaty Bodies – Law and Legitimacy*, Cambridge University Press, Cambridge 2012, p 29, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2013298.

[60] R GARDINER, above note 37, p 283; B SIMMA and T KILL, 'Harmonising Investment Protection and International Human Rights: First Steps towards a Methodology' in C BINDER ET AL (eds), *International Investment Law for the 21st Century*, Oxford University Press, New York 2009, p 678, pp 683-686.

[61] R GARDINER, above note 37, pp 282-284; F BREMAN, 'Treaty "Interpretation" in a Judicial Context' (2004) 29 *Yale Journal International Law* 315, 318; U LINDERFALK, above note 37, p 364; J PAUWELYN, above note 36, p 256.

[62] *Alex Thomas* §§ 97-98.

[63] Ibid § 89; *Wilfred Onyango Nganyi* § 166.

a right under the ACHPR. This is important in cases in which the ACtHPR does not merely present a comparative overview of treaty provisions but also defines the scope of protection of the rights under the ACHPR by reference to other instruments. To give an example, given that Article 14(3)(d) ICCPR explicitly includes the right to free legal aid as an inherent element of the right to a fair trial,[64] is the ACtHPR to construe Article 7(1)(c) ACHPR on the right to a fair trial, which lacks such a provision, as including the right to free legal aid? Should the ACtHPR use an *a contrario* argument in this instance, thereby excluding the right to legal aid from the scope of Article 7 ACHPR, or should the ACtHPR use a 'by analogy' argument supporting human rights integration and, consequently, read the right to free legal aid into the right to a fair trial under the ACHPR? The ACtHPR's general approach is to pursue international human rights integration by reading more detailed and effective standards of human rights into the ACHPR's scope. The ACtHPR established in a series of cases that the right to a fair trial includes the right to free legal assistance, and its reasoning was grounded in its interpretation of Article 7(1)(c) of the ACHPR in light of Article 14(3)(d) ICCPR.[65] This has served to strengthen the weak safeguards under the ACHPR in the area of criminal procedure before and during trial.[66] On another occasion, the ACtHPR read Article 66(2)(c) Revised ECOWAS Treaty on the rights of journalists and Article 9 ACHPR on freedom of expression together, incorporating the guarantees of the former into the protective scope of the latter.[67] Furthermore, in *Lohé Issa Konaté*, which concerned the question of whether the harsh criminal penalties for defamation imposed on the applicant by Burkina Faso represented a disproportionate interference with his right to freedom of expression, the ACtHPR pursued a very restrictive construction of the ACHPR's claw-back clause.[68] The ACtHPR held that the phrase 'within the law' must be interpreted in a manner that does not subject the rights envisaged in the ACHPR to the domestic law of State parties. It did so by interpreting Article 9 ACHPR with reference to international standards, including Article 19 ICCPR and the views thereon of the HRC,[69] the practice of the African Commission[70] and the case law of the ECtHR and the IACtHR.[71] Although this is, in principle, a welcome development in the direction of a growing convergence among international bodies when interpreting limitation and claw-back

[64] *Alex Thomas* § 88.
[65] Ibid; *Wilfred Onyango Nganyi* § 165; *Mohamed Abubakari* § 138.
[66] C HEYNS, above note 6, 159.
[67] *Abdoulaye Nikiema and others* § 180.
[68] Article 9(2) reads 'Every individual shall have the right to express and disseminate his opinions *within the law'* (emphasis added).
[69] *Lohé Issa Konaté* § 128,
[70] Ibid § 129.
[71] Ibid §§ 147-154, 158-163.

clauses, it raises the question of what the permissible impact of human rights integration should be within the confines of interpretation.[72] The ICCPR, the IACHR and the ECHR do not contain similar clauses and, therefore, one might argue that they cannot qualify as appropriate comparators to justify the 'neutralisation' of the claw-back clauses provided in the ACHPR. In fact, the only other human rights treaty which includes similar claw-back clauses is the Revised Arab Charter,[73] but the ACtHPR chose to make no reference to it.[74] This underscores the inherent risk of selectiveness when determining which other treaties are to be taken into account when interpreting the ACHPR.

A third way that the ACtHPR uses international instruments is by integrating detailed criteria articulated by other international bodies and courts into its own analysis and jurisprudence. Such criteria are employed to define legal terms and to support the progressive development of the corpus juris of human rights law. In *Wilfred Onyango Nganyi*, the ACtHPR, in seeking to establish the meaning of 'trial within a reasonable time' under Article 7(1)(d) ACHPR, took recourse to the criteria of reasonableness developed throughout the extensive case law of the ECtHR.[75] In *Alex Thomas*, the jurisprudence of the ECtHR and the views of the HRC were invaluable guides for the ACtHPR in deciding whether a delay in the appeal proceedings before national courts met the threshold of 'severity' required for an alleged violation of inhuman treatment to be substantiated.[76] In *African Commission on Human and Peoples' Rights v Republic of Kenya*, the ACtHPR addressed the issue of whether the Ogiek are an indigenous population.[77] The elements of the definition of 'indigenous people' were discussed on the basis of the criteria developed in the work of the Commission through its Working group on indigenous populations and the UN Special Rapporteur on Minorities, which, according to the ACtHPR, generally reflect the current normative standards in international law for identifying indigenous populations.[78]

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[72] D SHELTON, 'International Decisions' (2015) 109 *American Journal of International Law* 635; cf A RACHOVITSA, 'The Principle of Systemic Integration in Human Rights Law' (2017) 66 *International & Comparative Law Quarterly* 557, 567-568. For a similar approach by the African Commission see I BANTEKAS and L OETTE, above note 8, p 279.

[73] League of Arab States, Revised Arab Charter on Human Rights (adopted 22 May 2004; entered into force 15 March 2008) reprinted in 12 (2005) IHRR 893.

[74] The vice-president of the ACtHPR, in a separate opinion issued in another case, pointed out this problematic issue, but concluded, in line with the ACtHPR and with no further explanation, that the ACHPR should be interpreted in the same spirit as the ICCPR. See Separate Opinion of Vice-President Fatsah Ouguergouz in *Tanganyika Law Society* §§ 29-31.

[75] *Wilfred Onyango Nganyi* §§ 136-154.

[76] *Alex Thomas* §§ 146-147.

[77] *African Commission on Human and Peoples' Rights v Republic of Kenya*.

[78] Ibid § 108.

The overall impact of other international human rights instruments in the ACtHPR's case law should not be understated. The ACtHPR relies heavily on other treaties and the judgments of other international courts in its interpretation of the ACHPR. However, the ACtHPR does not appear willing to acknowledge openly that other instruments are given substantial weight in its reasoning. It insists on proclaiming that 'The Court is fortified in its reasoning by the decision of the African Commission, the ECtHR and the IACtHR, which are courts of similar jurisdiction.'[79] The ACtHPR frames the consideration of external instruments and case law as serving a secondary role and merely reaffirming an interpretation reached via other means. Yet, in practice, the systematic and lengthy references to other international instruments and jurisprudence, and their impact on the ACtHPR's construction of the ACHPR, suggest otherwise.

As a final note, there is considerable room to improve the transparency and quality of the ACtHPR's methodology and reasoning. A good start for the ACtHPR might be invoking Articles 60 and 61 ACHPR in an explicit fashion and elaborating on the legal bases for the different uses of international instruments. Also, it cannot go unnoticed that the VCLT rules on treaty interpretation (Articles 31-33) rarely, if ever, feature in the ACtHPR's judgments. It is curious that a newly established court such as the ACtHPR does not engage at all with the VCLT. Invoking the VCLT is a powerful way to enhance an international court's legitimacy, not to mention the quality of its judicial reasoning. Other international courts, including the International Court of Justice, the ECtHR and the IACtHR, invoke and use the VLCT almost automatically.[80] Even in instances in which a court invokes and applies the specialised interpretative rules contained in its own constitutive treaty, it still employs the VCLT on a complementary basis.[81] The VCLT's rules of interpretation are part of a 'common language' that all judges speak, and the ACtHPR should participate with its own 'voice'.

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[79] *Alex Thomas* §§ 95-98. See also *Wilfred Onyango Nganyi* §§ 169-179.

[80] K-M SOREL and V BORE EVENS, 'Article 31' in O CORTEN and P KLEIN (eds), *The Vienna Conventions on the Law of Treaties – A Commentary*, Oxford University Press, Oxford 2011, p 804 at p 820.

[81] For example, the IACtHR in its legal reasoning employs a series of legal bases for legitimising the use of other treaties in the interpretation process. These bases include the construction of the IACHR within the system of which it forms part, the need for an evolutive interpretation of human rights, the principle of the *corpus juris* of human rights protection, Article 31(3) VCLT and Article 29(b) IACHR. See, for instance, *Yakye Axa Indigenous Community v Paraguay*, Judgment on Merits, Reparations and Costs, Series C, No. 125, 17 June 2005 §§ 125, 126, 128. For a general discussion, see GL NEUMAN, 'Import, Export and Regional Consent in the Inter-American Court of Human Rights' (2008) 19 *European Journal International Law* 101; A RACHOVITSA, above note 2, pp 88-96.

3.3 Nurturing the Specificity of the ACHPR in Connection with International Human Rights Integration: Human Rights Integration as an Interpretative 'Bulldozer', or as a Set of Alternative Arguments?

The ACtHPR's systematic reliance on the case law of the European and Inter-American Courts of Human Rights raises the question of whether such an influence is (or could be) disproportionate. The crux of the matter is whether there is a need to balance *international* human rights integration with the specificity of the African ACHPR, and, if so, how. International human rights integration means reading the ACHPR in light of global and other regional human rights standards; at the same time, however, the specificity of the ACHPR vis-à-vis global international instruments and treaties (e.g. the ICCPR) and other regional treaties such as the ECHR and IACHR must be preserved. Although international human rights integration does not exclude regional human rights integration, these are two different arguments which may sometimes point in different interpretative directions. Heyns argues that the broad jurisdiction of the ACtHPR poses a risk to the specificity of the ACHPR, because the ACHPR will become just one of a number of treaties for the ACtHPR.[82] Nonetheless, in this author's opinion, this risk is more likely to materialise as a result not of the ACtHPR's broad jurisdiction but of the manner in which the ACtHPR construes the ACHPR and its specificities in the context of interpretation.

Conceptualising the development of the ACHPR within the context of international human rights law is a challenging task for the ACtHPR ― an international court that is still comparatively young. On the one hand, it is reasonable to expect the ACtHPR to take into serious consideration, and benefit from, the long-standing jurisprudence of other regional human rights courts. On the other hand, coordination and convergence with global and other regional standards should not come at the expense of neglecting the development of a regional (African) human rights understanding, the contours of which have already been established by the African Commission.[83] This specificity can be observed in the unique and special characteristics of human rights in the ACHPR and the local legal reality in State parties to the ACHPR, and it raises the possibility of different interpretations of specific human rights (compared with how the same rights are interpreted under other treaties) should different contexts require it.[84] Human rights integration should not be seen and used as an interpretative

[82] C HEYNS, above note 6, p 167.
[83] I BANTEKAS and L OETTE, above note 8, p 281. Also AK PERRIN, above note 9, pp. 32-33.
[84] R HIGGINS, 'A Babel of Judicial Voices? Ruminations from the Bench' (2006) 55 *International & Comparative Law Quarterly* 791, 795.

'bulldozer'; rather, it should highlight difference and variety in legal standards. Pursuing and nurturing an African corpus juris, when necessary, is compatible with the European consensus argument articulated by the ECtHR and with the international and regional corpus juris interpretative tool put forward by the IACtHR.[85]

These considerations need to be duly appreciated in the ACtHPR's legal reasoning. Interpretative tools and principles are not mere technicalities, but reflect and articulate the ACtHPR's approach. In this regard, human rights integration gives rise to different and equally valid arguments depending, among other things, on how an international body selects and uses relevant international instruments when construing its constitutive instrument. For instance, when the ACtHPR is in the process of discerning the ordinary meaning of a provision in the ACHPR, its starting point and primary focus should be the text of the ACHPR, without resorting prematurely to the case law of the ECtHR regarding the interpretation of an equivalent right under the ECHR, as was the case in *Wilfred Onyango Nganyi*.[86] Moreover, the ACtHPR should engage in its reasoning with both the global and other regional standards in a balanced and consistent manner ─ especially if the State concerned is bound by said global standard(s).[87] Otherwise, the ACtHPR runs the risk of 'Europeanising' or 'Inter-Americanising' its jurisprudence[88] in the sense of overemphasising the relevance and influence of other regional human rights treaties. One should also be mindful that the criteria developed by the jurisprudence of other international courts need to be tailored and applied in light of local circumstances and the legal reality in African countries. In the *Mohamed Abubakari* case, the fact that the judgment was not delivered publicly should have been given more weight in the assessment of the alleged violation of the right to a fair trial under the ACHPR, since, unlike in Europe, it is not common practice in many African States to have immediate access to the text of the judgment.

Finally, it is likely that a preoccupation with the relevance of the (semi-)judicial practice of other international bodies could hinder the realisation of the ACtHPR's potential for developing the specificities of the ACHPR and the African corpus juris.[89] An obvious area of

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[85] M DE PAUW, 'The Inter-American Court of Human Rights and the Interpretive Method of External Referencing' in Y HAECK, O RUIZ-CHIRIBOGA and C BURBANO-HERRERA (eds), *The Inter-American Court of Human Rights: Theory and Practice, Present and Future*, Intersentia, Cambridge 2015, p 3, pp 20-22.
[86] JD MUJUZI, above note 4, p 218.
[87] This was a point underlined in the Partly Dissenting Opinion of Vice-President, Justice Elsie N. Thompson in *Mohamed Abubakari* §§ 9-10 and the Dissenting Opinion of Judge Rafâa Ben Achour in *Mohamed Abubakari* §§ 15-17.
[88] JD MUJUZI, above note 4, pp 218-219.
[89] For a comprehensive discussion see J GILBERT, 'Litigating Indigenous Peoples' Rights in Africa: Potential, Challenges and Limitations' (2017) 66 *International & Comparative Law Quarterly* 657.

interest is how the ACtHPR will address peoples' rights under the ACHPR given the fact that the latter is markedly different to the ECHR and the IACHR. As discussed in Part 2, the African Commission in the *SERAC and CESR v Nigeria* case paved the way for the acknowledgment of the right to property, the right to housing and the right to a dignified life as *collective* human rights. Nonetheless, the ACtHPR is hesitant to follow this approach. In the 2017 judgment on the *African Commission on Human and Peoples' Rights v Republic of Kenya* case, the ACtHPR gave an affirmative answer to the question of whether the Ogiek are an indigenous population.[90] It also held that the expulsion of the Ogiek from their ancestral lands, against their will and without prior consultation, violated their communal ownership rights under the right to property. Still, the ACtHPR left it unclear as to whether this violation was pronounced with regard to the individual members of the Ogiek or the Ogiek as a collectivity (or even both).[91] The ACtHPR reserved its judgment on reparations and, consequently, it remains to be seen whether it will recognise the entire community as a victim of human rights violations entitled to reparations.[92] The ACtHPR's overall position concerning the alleged violation of the community's right to decent survival is rather disappointing. The applicants argued that limited access to and removal from their ancestral home threatened to destroy the community's way of life and infringed their right to decent survival, thereby constituting a violation of Article 4. The ACtHPR highlighted the distinctive features of the ACHPR by underlining that 'Contrary to other human rights instruments, the ACHPR establishes the link between the right to life and the inviolable nature and integrity of the human being'[93] and that violations of economic, social and cultural rights may engender conditions unfavourable to a decent life. The ACtHPR, however, held that the sole fact of eviction and the deprivation of specific rights did not amount to a violation of Article 4 ACHPR, and that although some members of the Ogiek had died, no causal connection had been established between the evictions and those deaths.[94] The ACtHPR's assessment may be fair and sound in light of the specific circumstances of the case. Even so, one cannot but emphasise that the ACtHPR failed to examine and assess the impact of the overall circumstances and the violations of other rights on the decent survival of the Ogiek as a people rather than merely on the decent survival of individual members. In this judgment, the ACtHPR took into account the practice of the African Commission, the views and General Comment of the ICESCR Committee and the case

[90] *African Commission on Human and Peoples' Rights v Republic of Kenya*.
[91] Ibid §§ 128-131.
[92] Ibid § 223. The judgment on reparations is currently pending.
[93] Ibid § 152.
[94] Ibid §§ 152-155.

law of the IACtHR. Nonetheless, the practice of other bodies is of limited relevance to the ACtHPR's development of the more promising provisions of the ACHPR. The ACtHPR needs to chart new territory, with the potential to surpass even the ground-breaking ― but controversial by the standards of the IACHR ― 2015 judgment in the *Kaliña and Lokono Peoples v Suriname* case regarding the recognition of the collective juridical personality of populations.[95]

4 Conclusions

This chapter has focused on certain uniquely drafted features of the ACHPR and the Protocol thereto as they have been interpreted and applied by the ACtHPR in connection with human rights integration. The analysis demonstrated that human rights integration is fostered by, and dependent upon, the drafting and design of a human rights treaty. It was argued that, where appropriate, divergence in treaty design should be understood as contextual difference. Human rights integration should evaluate such instances carefully and should accommodate them in legal reasoning. In this sense, human rights integration is not a single argument, but rather it consists of different possible arguments depending on the explicit and implicit choices made in the process of interpretation. The discussion demonstrated how human rights integration can and should be relevant in supporting convergence on a regional or universal level or both. In the case of the ACtHPR, human rights integration highlights (and at the same time justifies) different arguments and interpretative directions concerning the advancement of an African human rights corpus juris and/or the convergence of the ACHPR with other regional and universal human rights treaties.

The ACtHPR is very receptive to using other international instruments in interpreting the ACHPR. This is a practice that merits careful study, for two distinct reasons. First, the interpretative use of other international instruments and views of other bodies helps avoid some of the difficulties associated with the ACtHPR's broad jurisdiction. Second, the use of other international instruments, and the practice of judicial borrowing in general, are the means by which the ACtHPR construes the international and regional corpus juris on human rights. The discussion demonstrated that the ACtHPR integrates more detailed human rights standards into

[95] See *Kaliña and Lokono Peoples v Suriname*, Judgment on Merits, Reparations and Costs, Series C, No 309, 25 November 2015 §§ 107-114; Partially Dissenting Opinion of Judge Alberto Pérez Pérez in *Kaliña and Lokono Peoples v Suriname* § 9 and commentary L LIXINSKI, 'International Decisions – Case of the *Kaliña and Lokono Peoples v Suriname*' (2017) 111 *American Journal of International Law* 147, 152.

the ACHPR's scope by reading the ACHPR in light of a variety of international treaties and other instruments. Although this is, in principle, a welcome practice, it is important not to lose sight of the question of what the appropriate impact of human rights integration should be within the confines of interpretation. In this respect, there is the question as to whether, and, if so, to what extent, the varying formulations of human rights across different treaties preclude the convergence of standards and, accordingly, dictate the preservation of the specificity of a human rights treaty provision. There is also the issue of how the ACtHPR will calibrate its case law in order to develop the distinctive features of the ACHPR and construe an African human rights corpus juris while embedding them in international human rights law. How the ACtHPR assesses the relevance of the jurisprudence and views of other regional courts and bodies on human rights to the interpretation of the ACHPR, and the influence they should exert, will also be crucial.

This brings us to the final point, which relates to the quality of the ACtHPR's reasoning. Legal reasoning is not merely a matter of technicality or semantics; it is the means by which all of the foregoing considerations are put into practice and, therefore, it is a factor in evaluating the ACtHPR's overall contribution to international law.[96] The ACtHPR should be more transparent with regard to acknowledging the significant influence of other international treaties and instruments and the views of other international bodies and courts on its case law. Transparency may also be improved by explicitly invoking the principles of interpretation under the ACHPR (Articles 60 and 61) and by engaging with, and using, the VCLT rules on treaty interpretation (Articles 31-33). It is expected that the subject matter of the complaints that are brought before the ACtHPR in future will be more diverse, and therefore the ACtHPR will have the opportunity to clarify and develop the specificities of the ACHPR.

[96] See JG MERRILLS, above note 9, p 21. See also H LAUTERPACHT, above note 9, pp 37-40.